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No. 00-730

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IN THE

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

NORMAN Y. MINETA, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICUS CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The Associated General Contractors of America, Inc. ("AGC"), is a nonprofit trade association founded in 1918 to represent and serve the national interests of general construction contractors and other firms associated with the construction industry. [1] AGC has more than 100 state and local

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the Associated General Contractors of America, Inc., or its members made a monetary contribution to the preparation or submission of the brief.

chapters, with at least one chapter serving the general contractors and related firms in each State, and one chapter in Puerto Rico. AGC's more than 32,000 regular and associate members engage in the construction of highways, bridges, tunnels, airports, dams and other water conservation projects, water works and waste treatment facilities, and defense facilities.

AGC has long supported open competitive bidding for public construction contracts. That system typically requires interested contractors to submit sealed bids by a specified date and time. It also requires the government agency to open all bids publicly and to award the contract to the lowest responsive and responsible bidder. For these reasons, open competitive bidding typically precludes discrimination based on race or ethnicity, and AGC vigorously opposes any such discrimination. AGC has helped and will continue to help its chapters offer training and other assistance to minority firms.

AGC participated previously in this case by filing an amicus curiae brief in support of certiorari and by filing amicus curiae briefs in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), and *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147 (10th Cir. 2000) (decision below). AGC argued in these briefs that the federal government's use of a race-based contracting preference is subject to, and in this case cannot survive, strict scrutiny. In conflict with decisions of this Court, the Tenth Circuit below held otherwise.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a); the requisite consent letters have been filed with the Clerk.

STATEMENT OF THE CASE

The Challenged Program. The United States Department of Transportation ("DOT") has two Disadvantaged Business Enterprise ("DBE") programs. One applies to contracts that DOT awards to prime contractors for the construction of

highways and other transportation projects on federal lands. The other applies to grants and other financial assistance that DOT provides to the states and others for the construction of similar projects. This case implicates only the first of these two programs. It arose out of a contract between DOT and a prime contractor for the construction of a highway on federal property in Colorado.

The DBE program that applies to such contracts establishes, among other things, goals for awarding subcontracts to small business concerns owned and controlled by "socially and economically disadvantaged individuals." It includes financial penalties and incentives to induce prime contractors to achieve those goals. At the heart of the DBE program lies a presumption that members of certain racial groups are presumed to be "socially and economically disadvantaged."

The Statutory Bases. Congress first authorized the challenged program in 1978 when it enacted § 8(d) of the Small Business Act, 15 U.S.C. § 637(d). In a series of subsequent authorization measures for the construction of highways and other transportation projects, Congress included provisions independently authorizing DOT to implement its DBE program. The first of these measures was the Surface Transportation Assistance Act of 1982 ("STAA"). 96 Stat. 2097. It was followed by the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), 101 Stat. 132, the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), 105 Stat. 1914, and the Transportation Equity Act for the 21st Century of 1998 ("TEA-21"), 112 Stat. 107. Each of these measures succeeded and replaced the preceding one.

Section 8(d) of the Small Business Act declares it to be "the policy of the United States that * * * small business concerns owned and controlled by socially and economically disadvantaged individuals * * * shall have the maximum practicable opportunity to participate in the performance of

contracts let by any Federal agency." 15 U.S.C. § 637(d)(1).[2] In furtherance thereof, all contracts let by any federal agency, with certain exceptions not relevant here, must include a clause which reiterates that policy and instructs contractors to presume that "socially and economically disadvantaged individuals" include "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities * * *." *Id.* at § 637(d)(2), (d)(3)(A), (C).

Section 8(d) also provides that "[b]efore the award of any contract to be let * * * by any Federal agency * * * the apparent successful offeror shall negotiate with the procurement authority a subcontracting plan" which includes, among other things, "percentage goals for the utilization as subcontractors of * * * small business concerns owned and controlled by socially and economically disadvantaged individuals." *Id.* at § 637(d)(4)(B), (d)(6)(A).[3] "No contract shall be awarded to any offeror unless the procurement authority determines that the plan to be negotiated by the offeror * * * provides the maximum practicable opportunity for * * *

[2] The Act establishes "[t]he Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1). The Act also requires the head of each federal agency to set agency-specific goals for participation by "small business concerns owned and controlled by socially and economically disadvantaged individuals" in the procurement contracts of such agency. *Id.* at § 644(g)(2).

[3] This requirement applies to all contracts (1) which are let "pursuant to the negotiated method of procurement"; (2) which are required to include § 8(d)'s race-based presumption; (3) which "may exceed $1,000,000 in the case of a contract for the construction of any public facility, or $500,000 in the case of all other contracts"; and (4) which offer "subcontracting possibilities." 15 U.S.C. § 637(d)(4)(B)(i)-(iv).

small business concerns owned and controlled by socially and economically disadvantaged individuals * * * to participate in the performance of the contract." *Id.* at § 637(d)(4)(D).

Like its predecessors, TEA-21 provides that "not less than 10 percent" of certain amounts authorized for appropriations under the Act "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." § 1101(b)(1), 112 Stat. 113. These amounts include funding for the Federal Lands Highway Program, under which the contract in this case was awarded. *See* § 1115, 112 Stat. 154. TEA-21 also states that the term "socially and economically disadvantaged individuals" has "the meaning such term has under section 8(d) of the Small Business Act." § 1101(b)(2)(B), 112 Stat. 113. As noted, in defining "socially and economically disadvantaged individuals," § 8(d) includes a presumption that "socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities * * *." 15 U.S.C. § 637(d)(3)(C).

The Evidence of a Compelling Interest. In an effort to establish a compelling need for the DBE program challenged in this case, the government has cited and primarily relied on a document entitled "Appendix—The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey," 61 Fed. Reg. 26,050 (1996) ("Appendix"), and the hearings and reports cited therein. *See* Reply Br. for the Federal Appellants in the United States Court of Appeals for the Tenth Circuit at 9-15.[4] More recently, the government

[4] The Appendix—prepared by the Justice Department in the wake of this Court's first decision in *Adarand* with an eye toward the litigation to follow from this Court's 1995 remand—purports "to summarize the evidence that has been assembled to date on the compelling interest question" and "the legislative record that

has cited and relied on the legislative record of TEA-21. *See* Opp. Cert. 5-6, 15-16, 23.

SUMMARY OF ARGUMENT

In its first opinion in this case, this Court made clear that *all* racial classifications, even those characterized as "benign," "must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *See Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 226-227, 235-236 (1995). In order for a race-based program to survive this exacting review, the government must do more than merely articulate a compelling governmental interest. Rather, there must be a "strong basis in evidence" to support its conclusion that action based on race is necessary. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

The compelling interest offered by the government here—and accepted by the Tenth Circuit below—is remedying the effects of past and present discrimination against minority contractors in the construction industry. In enacting TEA-21, however, Congress took little note of its obligation to assemble contemporary evidence of such discrimination. The legislative history of TEA-21 contains conclusory statements by individual members of Congress on the floor of the House and Senate, but no body of evidence that Congress, as a whole, may have considered sufficient to demonstrate a compelling need for the program. Although Congress has received evidence purporting to justify the use of racial preferences over the years, Congress has never considered the sort of evidence that would support the use of the race-based contracting preference at issue here.

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underpins the acts of Congress that authorize affirmative action measures in procurement." 61 Fed. Reg. at 26,050. It was extensively relied on by the Tenth Circuit below. *See* Pet. App. 31-44. But as petitioner and others explain, the Appendix fails to demonstrate a compelling interest for the racial preference at issue here.

ARGUMENT

I. THIS COURT REQUIRES A "STRONG BASIS IN EVIDENCE" FOR THE ENACTMENT OF ANY RACIAL CLASSIFICATION.

In *Adarand*, this Court ruled that "all racial classifications, imposed by whatever federal, state, or local government actor," are subject to strict scrutiny. 515 U.S. at 227. To satisfy this most demanding level of equal protection review, a racial classification "must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Id.* at 235.

There is no question that remedying the effects of past or present discrimination is a compelling governmental interest that would justify a racial preference in an appropriate case. *See id.* at 237; *Shaw* v. *Hunt*, 517 U.S. 899, 909 (1996). But "simple legislative assurances of good intention cannot suffice." *Croson*, 488 U.S. at 500. *See also Adarand*, 515 U.S. at 226 ("[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.") (quotation omitted) (alteration in original). Instead, this Court has insisted on a " '*strong basis in evidence* for [the government's] conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (opinion of Powell, J.) (emphasis added). *See also Adarand*, 515 U.S. at 236 (" '[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be *clearly identified*' ") (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 533-535 (1980) (Stevens, J., dissenting)) (alteration in original) (emphasis added).

In applying strict scrutiny, this Court accordingly conducts a "close examination" of the "factual basis" for a racial

classification. *Croson*, 488 U.S. at 495 (citing *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 (1975)). As this Court observed in *Adarand*:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. [515 U.S. at 226 (quoting *Croson*, 488 U.S. at 493 (opinion of O'Connor, J.)).]

On several occasions, this Court has made clear that a legislative body should determine whether a "factual basis" for a racial preference exists at the time the preference is enacted. *See Shaw*, 517 U.S. at 910 ("the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program' ") (quoting *Wygant*, 476 U.S. at 277 (opinion of Powell, J.)) (emphasis added in *Shaw*); *Adarand*, 515 U.S. at 229 (" '*Unless Congress clearly articulates the need and basis* for a racial classification, *and also tailors the classification to its justification*, the Court should not uphold this kind of statute.' ") (quoting *Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting)) (emphasis added in *Adarand*); *Croson*, 488 U.S. at 504 (legislative bodies "must identify * * * discrimination * * * with some specificity *before* they may use race-conscious relief") (emphasis added). *See also Associated Gen. Contractors of Ohio, Inc.* v. *Drabik*, 214 F.3d 730, 738 (6th Cir. 2000) ("[U]nder *Croson*, the state must have had sufficient evidentiary justification for a racially conscious statute *in advance of its passage*; the time of a challenge to the statute, at trial, is not the time for the state to undertake factfinding.") (emphasis added), *cert. denied*, 121 S. Ct. 1089

(2001). Indeed, it would make no sense for a legislative body to enact a racial preference before determining whether it was supported by a "strong basis in evidence" simply because it might be fortuitously justified after the fact. Moreover, unless it clearly identifies the nature and scope of the discrimination it seeks to remedy, a legislative body cannot begin to craft a narrowly tailored remedy. Thus, "[p]roper findings * * * are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects." *Croson*, 488 U.S. at 510 (opinion of O'Connor, J.).

As this Court emphasized in *Adarand*, a race-based program must also be "appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.' " 515 U.S. at 238 (quoting *Fullilove*, 448 U.S. at 513 (Powell, J., concurring)). *See also Croson*, 488 U.S. at 510 ("findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a *temporary* matter") (opinion of O'Connor, J.) (emphasis added). Accordingly, it will not do for a legislative body simply to reenact a racial preference that may have been justified at some point in the past; the legislative body must assure itself of the continuing justification for any such racial preference. This requires a "strong basis in evidence" at the time the legislative body acts; simple reliance on evidence that may have once supported a racial preference will not satisfy strict scrutiny.

If the legislative record reveals that the legislative body made little or no effort to determine whether a "strong basis in evidence" supported the enactment of a racial preference, a court should be particularly skeptical that the preference serves a compelling governmental interest. *See Adarand*, 515 U.S. at 228 ("courts should take a skeptical view of all governmental racial classifications").

In *Croson*, this Court conducted a "searching judicial inquiry" into the "factual basis" for a municipality's minority set-aside program and held that program unconstitutional. 488 U.S. at 498-506.[5] Because *Croson* dealt with a racial preference intended to combat alleged discrimination in the construction industry, the manner in which the Court applied strict scrutiny is particularly instructive here.

At the outset, the *Croson* Court established that past "societal discrimination" cannot justify the use of a racial preference. *Id.* at 499 ("While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts."). The Court also made clear that "an amorphous claim that there has been past discrimination in a particular industry" also cannot support the use of a racial preference. *Id.* Thus, wholly conclusory statements by members of a legislative body "are of little probative value in establishing identified discrimination in [a particular] construction industry." *Id.* at 500. *See also id.* at 501 ("The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.").

Statistical proof, on the other hand, can be far more probative. *Id.* at 501.[6] But as the *Croson* Court made clear, not all

[5] This Court has also recently conducted a "close examination" of the legislative record in cases involving Congress' exercise of its remedial authority under § 5 of the Fourteenth Amendment. *See Board of Trustees* v. *Garrett*, 121 S. Ct. 955, 964-966 (2001); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 89-91 (2000).

[6] Indeed, since *Croson* the courts of appeals have found that a "strong basis in evidence" for a racial classification generally cannot be shown "without a proper statistical foundation." *Coral Constr. Co.* v. *King County*, 941 F.2d 910, 919 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992). *See also Engineering Contractors Ass'n of S. Fla. Inc.* v. *Metropolitan Dade County*, 122 F.3d 895, 925 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998); *Concrete Works of Colo., Inc.* v. *Denver*, 36 F.3d 1513, 1520, 1530 (10th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995); *Contractors Ass'n of E. Pa., Inc.* v. *City of Philadelphia*, 6 F.3d 990, 1003, 1005 (3d Cir. 1993); *O'Donnell Constr. Co.* v. *District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

statistical evidence is probative of discrimination. For instance, the Court concluded that evidence that minority businesses received 0.67% of the City of Richmond's prime contracts while minorities constituted 50% of the city's population had "little probative value." *Id.* at 501 (quotation omitted). "[W]here special qualifications are necessary, the relevant statistical pool * * * must be the number of minorities qualified to undertake the particular task." *Id.* at 501-502. *See also id.* at 509 ("Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.") (opinion of O'Connor, J.); *Drabik*, 214 F.3d at 736 (rejecting data that "does not distinguish minority construction contractors from minority businesses generally, and *a fortiori* makes no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size").

The *Croson* Court also indicated that statistical disparities should be closely examined to determine whether they might be explained by factors other than racial discrimination. For instance, the Court observed that the small number of minority firms in the local construction industry could be the result of "a host of nonracial factors which would seem to face a member of any racial group attempting to establish a new business enterprise, such as deficiencies in working capital,

inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record." 488 U.S. at 498-499. With respect to the low minority membership in local contractors' associations, the Court concluded that "[t]here [were] numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white entrepreneurial choices." *Id.* at 503.

Significantly, the *Croson* Court made clear that a racial preference intended to remedy discrimination in the construction industry should be supported by evidence of discrimination in the particular sector of the construction industry to which the preference is applied. *See id.* at 498 ("[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.").[7] Similarly, a racial preference must be supported by evidence of discrimination in each particular geographic region in which the preference is applied. As the *Croson* Court observed, this Court "has never approved the

[7] For classification purposes, the federal government divides the construction industry into three main sectors—(1) building, developing, and general contracting; (2) heavy (including highway); and (3) special trade. *See* Office of Management and Budget, Executive Office of the President, *North American Industry Classification System: United States* 89-104 (1997). These three sectors are further broken down into numerous subsectors. *See id.* As one court has noted, "Firms that build hospitals (SIC 15) do not compete for County contracts with firms that lay asphalt (SIC 16) or firms that install plumbing (SIC 17), therefore comparisons between these disparate entities would not produce a reliable portrait of County contracting trends." *Engineering Contractors Ass'n of S. Fla., Inc.* v. *Metropolitan Dade County*, 943 F. Supp. 1546, 1560 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998).

extrapolation of discrimination in one jurisdiction from the experience of another." *Id.* at 505. Finally, there must be evidence of discrimination against each particular racial group included within the scope of a racial preference. *See id.* at 506 ("The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.").

These insights from *Croson* on how strict scrutiny should be applied to a racial preference affecting a municipality's methods of awarding construction contracts are directly pertinent to this case involving a federal preference. As this Court explained in its first opinion in this case, "the equal protection obligations imposed by the Fifth and Fourteenth Amendments [are] indistinguishable," and "congruence between the standards applicable to federal and state racial classifications" is one of the core principles governing analysis in this area. *Adarand*, 515 U.S. at 217, 226.

II. THE LEGISLATIVE HISTORY OF TEA-21 REVEALS THAT CONGRESS NEGLECTED ITS OBLIGATION TO JUSTIFY THE CHALLENGED PROGRAM.

As noted, TEA-21 is the latest statute to authorize DOT's use of a racial preference in awarding federal highway contracts. Although it was enacted a full generation after Congress first authorized DOT's DBE program in 1978, nothing in the Act's legislative history indicates that Congress carefully considered whether there was a "strong basis in evidence" for continuing that program. Indeed, as several members of the House specifically noted:

> No evidence [was] presented to [the Committee on Transportation and Infrastructure, to which the House bill was referred] that actual discrimination has occurred within the transportation construction industry. No evi-

> dence [was] presented that race-neutral remedies were attempted and found deficient. No evidence [was] presented justifying the use of the program on a nation-wide basis. No statistical evaluations [were] presented justifying the use of the program in any given market. No evidence [was] presented justifying the fact that the program does not include a procedure for individualized inquiries into whether a particular DBE has suffered from past discrimination. [H.R. Rep. No. 105-467, at 500 (1998) (additional views).]

Similarly, as pointed out by Senator Sessions, who sat on the Environment and Public Works Committee to which the Senate bill was referred, "there is no legislative record to support this racial classification." 144 Cong. Rec. S1400 (1998). The Environment and Public Works Committee "had no hearings, took no testimony, [and] did no study as to the advisability and the practicality of how these preferences work out in real life." *Id.* at S1398. The committee "made no findings, [and] made no factual analysis of the interstate highway program in order to determine [whether] there is some sort of systematic discrimination ongoing that ought to be corrected." *Id.* at S1400.

During the floor debates on TEA-21, some members of Congress attempted to justify the DBE program's race-based presumption of disadvantage. None of them, of course, purported to speak for Congress as a whole. Nor did any of them cite or produce evidence sufficient under this Court's precedents to demonstrate a compelling need for that racial presumption.

Much of the "evidence" put forth consisted of the sort of conclusory statements this Court has held "[have] no place in equal protection analysis." *Croson*, 488 U.S. at 501. *See, e.g.*, 144 Cong. Rec. at S1426 ("There is discrimination in the construction industry.") (Sen. Domenici); *id.* at H2006 ("The fact remains that as a result of continued discrimination * * * minority-owned firms remain underrepresented in the construction field.") (Rep. Jackson-Lee); *id.* at H2010 ("If [members of Congress] do not believe that discrimination exists in the construction industry, they are blind.") (Rep. Towns); *id.* ("Discrimination is alive and well and manifesting itself through the difficulties minorities * * * continue to face in securing access to contracts.") (Rep. Dixon).

In fact, many such statements simply referred to "societal discrimination," which this Court has identified as " 'too amorphous for imposing a racially classified remedy.' " *Croson*, 488 U.S. at 497 (opinion of O'Connor, J.) (quoting *Wygant*, 476 U.S. at 276). *See* 144 Cong. Rec. at S1403 ("Let's face the facts. We all wish we lived in a society that does not discriminate based on * * * race. Well, we don't. * * * [M]embers of minority groups face barriers that the rest of us do not. That is why the DBE Program was created.") (Sen. Baucus); *id.* at S1410 ("[W]e still have discrimination in our country—does anybody believe that America is blind to issues of race? * * * Does anybody believe that we don't want to try and redress some major historical grievances? That is what we are doing through this program.") (Sen. Wellstone); *id.* at S1420 ("Racism [is an] unhappy, but still very real, phenomen[on] in our society. The DBE program is one of our responses to those lingering effects * * *.") (Sen. Mosley-Braun).

Some members of Congress cited statistics purporting to demonstrate a compelling need for the use of a race-based contracting preference in the construction industry. One set of statistics frequently cited was that while minorities make up over 20 percent of the population, minority-owned firms constitute only 9 percent of all construction firms and receive only 5 percent of all construction business receipts. *See id.* at S1409, S1421, S1426, S1492, S1494, S1496, H2010. But these statistics hardly suffice to show pervasive racial dis-

crimination in the construction industry.[8] To begin with, any comparison between the number of minority construction firms and the general minority population is "misplaced." *Croson*, 488 U.S. at 501. As this Court held in *Croson*, " '[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.' " *Id.* (quoting *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 308 n.13 (1977)) (alteration in original).

Likewise, the alleged disparity between the percentage of minority-owned firms and the percentage of construction business receipts may be explained by factors that have nothing to do with race. For instance, in the aggregate, minority-owned firms may be smaller than nonminority firms, and thus may generate lower business receipts. *See, e.g.*, *Engineering Contractors Ass'n of S. Fla., Inc.* v. *Metropolitan Dade County*, 122 F.3d 895, 916 (11th Cir. 1997)

[8] In fact, it appears that these statistics may be inaccurate. Although the members of Congress who cited these statistics failed to identify their source, it appears that they may have been misquoting statistics cited in the Appendix that minorities make up over 20 percent of the population, yet minority-owned businesses constitute 9 percent of all U.S. businesses and receive 4 percent of all business receipts. *See* 61 Fed. Reg. at 26,054 (citing statistics); *see also* 144 Cong Rec. at H3958 (Rep. Norton) (same). Statistics concerning minority construction firms might in fact be more favorable. Moreover, the statistics cited in the Appendix "are based on 1987 census data, the most recent full data available regarding the status of minority-owned businesses." *Id.* at 26,054 n.33. Thus, the statistics cited in support of TEA-21 may not only be inaccurate, but over a decade old. *See also* General Accounting Office, *Disadvantaged Business Enterprises* (GAO-01-586) 41 (June 1, 2001) (lack of information makes it "impossible to define the universe of DBEs, compare them with the transportation contracting community as a whole or gain a clear understanding of the overall impact of the DBE program").

("the disparities illustrated by the County's statistical analysis * * * are better explained by firm size than by discrimination"), *cert. denied*, 523 U.S. 1004 (1998). Other factors might include "[l]ack of interest in the particular work, other commitments, limitations [on] the amount of work they can handle, [and] lack of qualifications, especially where a State spends a large portion of its funds on a single large project requiring special contractors." 144 Cong. Rec. at S1417 (Sen. McConnell) (citing DOT regulations).

Another oft-repeated statistic was that white-owned construction firms receive 50 times more loan dollars than black-owned firms with identical equity. *See id.* at S1422, S1426, S1430, S1490, H2010, H3958. But that alleged disparity—the foundation of which was never explored—may also be explained by entirely nonracial factors. For instance, white-owned firms may be more established than black-owned firms, a factor that certainly has an effect in the lending market.[9] In any event, if such statistics are probative of any discrimination, it is discrimination in the lending market, *not* the construction industry. Under *Croson*, such statistics could not support the enactment of a remedial scheme in the construction industry. *See* 488 U.S. at 498. The same is also true of statistics concerning the bonding market. *See* 144 Cong. Rec. at S1430 (Sen. Kennedy) (citing statistics purporting to show disparity in obtaining bonding); *id.* at H3958 (Rep. Norton) (referring to alleged discrimination by bonding companies). Moreover, this particular statistic concerns black-owned firms only, and thus does not constitute *any* evidence of discrimination against the other

[9] Any difficulties faced by minority firms in gaining experience or establishing a proven track record—such as the lack of access to business networks, for example—are not in themselves indicative of racial discrimination. Indeed, such "nonracial factors * * * would seem to face a member of *any* racial group attempting to establish a new business enterprise." *Croson*, 488 U.S. at 498 (emphasis added).

racial groups included within the DBE program's race-based presumption. *See Croson*, 488 U.S. at 506 (even if evidence had shown discrimination against blacks, it would not support inclusion of other racial groups in set-aside program).

Much emphasis was also placed on statistics showing that more contracts are awarded to minority-owned firms when DBE programs are in place. *See, e.g.*, 144 Cong. Rec. at S1404, S1409, S1420, S1426, S1483, H2010, H3958. But it is hardly surprising that more contracts may be awarded to minority-owned firms when financial incentives or quotas are used. The fact that fewer contracts may be awarded when such programs are invalidated or discontinued is not probative of discrimination.

Some reference was also made to testimony and other evidence presented to Congress over the years. *See id.* at S1413, S1493, H3957-58.[10] That evidence, however, is

[10] Much of these materials are compiled in the Appendix, discussed *supra* at 5 & n.4.

One member of Congress also cited a number of state and local disparity studies. *See* 144 Cong. Rec. at H3958-59 (Rep. Norton). There was no indication in her statement, however, that those studies demonstrate the sort of disparity that the *Croson* Court indicated might be probative of discrimination—one demonstrating a "gross statistical disparit[y]" between "the number of minorities *qualified* to undertake [a] particular task" and the number actually engaged in a particular locality. 488 U.S. at 501-502 (emphasis added). *See generally Drabik*, 214 F.3d at 736 (rejecting disparity study); *Engineering Contractors*, 122 F.3d at 924 (same). And even if they were probative, they would still not support the use of a national preference. *See Croson*, 488 U.S. at 505 ("We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another."); *cf. Kimel*, 528 U.S. at 90 (even if 1966 report uncovered pattern of age discrimination in California's public agencies at the time, it was

plainly insufficient to demonstrate a compelling interest for the race-based presumption contained in TEA-21. Even if a "strong basis in evidence" for that presumption once existed, Congress was required to determine whether there was a continuing justification for extending its duration. Thus, Congress should have made specific findings to enable it "to define both the scope of [any] injury and the extent of [any] remedy necessary to cure its effects." *Croson* 488 U.S. at 510 (opinion of O'Connor, J.). As noted, however, the Committees which reviewed this legislation failed to take *any* testimony or compile *any* evidence concerning discrimination in the construction industry and the need for remedial action. Congress could not meet the strict scrutiny mandated by this Court simply by relying on evidence it had previously received for a variety of legislative purposes over a period of more than twenty years. *See, e.g.*, 61 Fed. Reg. at 26,052 & n.18.

In any event, the evidence presented to Congress over the years is plainly insufficient to support a nationwide remedial program applicable to nearly every racial minority in every type of construction business. There is no evidence of discrimination in every sector of the construction industry, in every geographic market, against every racial group covered by the DBE program. Under *Croson*, the lack of such evidence is fatal. *See* 488 U.S. at 498, 505-506.

There is a similar lack of support for the race-based presumption in § 8(d) itself. At the time Congress amended the Small Business Act to include that presumption in 1978, it made general findings that many persons "are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices," and that "such groups include * * * Black Americans, Hispanic Americans, Native Americans, and other

insufficient to support Congress' 1974 extension of ADEA to every State of the Union).

minorities." Pub. L. No. 95-507, § 201, 92 Stat. 1760 (1978). *See also* 15 U.S.C. §631(f)(B), (C).[11] Congress also made findings "that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups," and that such conditions could be improved through "the procurement by the United States of articles, equipment, supplies, services, materials, and construction work" from "small business concerns owned by socially and economically disadvantaged groups." Pub. L. No. 95-507, § 201, 92 Stat. 1760. *See also* 15 U.S.C. §631(f)(D), (F).

Of course, "[m]ore than good motives" were required for such broad-based remedial action. *Adarand*, 515 U.S. at 226 (quotation omitted). Congress, however, made no particularized findings concerning discrimination in any given industry. As noted, since then Congress has never considered the kind of evidence that would support the use of a race-based contracting preference in every procurement contract covered by § 8(d).

* * *

As this Court held in *Adarand*, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and [Congress] is not disqualified from acting in response to it." 515 U.S. at 237. But precisely because "classifications based on race are potentially so harmful to the entire body politic," *id.* at 236 (quoting *Fullilove*, 448 U.S. at 533-535 (Stevens, J., dissenting)), Congress must establish a "strong basis in evidence" before it takes race-conscious remedial action. Because Congress has never established the requisite basis for the race-based

[11] In 1980, Congress included "Asian Pacific Americans" within its findings and extended the § 8(d) presumption to that group. *See* Pub. L. No. 96-302, § 118, 94 Stat. 840 (1980).

contracting preference employed by DOT in this case, that preference cannot stand.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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